

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
HAUPPAUGE FIRE DISTRICT)	
)	File No. D090161
Application and Waiver Request for Use of)	
Certain Highway Maintenance Radio Service)	
Channels in Suffolk County, New York)	

MEMORANDUM OPINION AND ORDER

Adopted: July 6, 2000

Released: July 7, 2000

By the Deputy Chief, Wireless Telecommunications Bureau:

I. INTRODUCTION

1. We have before us a request from the Hauppauge Fire District (Hauppauge)¹ for reconsideration of the decision of the Wireless Telecommunications Bureau (Bureau)² denying its request for a waiver of the Commission's Rules, pursuant to Section 337 of the Communications Act of 1934 (Act), as amended,³ and Section 1.925 of the Commission's Rules.⁴ Upon consideration of the arguments and the record presented by Hauppauge, we deny the Petition.

II. BACKGROUND

2. Hauppauge is a public agency which provides fire fighting services to an eight square-mile district within Suffolk County, on Long Island, New York.⁵ It is the licensee of Station KEC785, and currently operates a 46 MHz band fire radio system, but contends that it cannot communicate effectively on this system due to co-channel interference.⁶ Hauppauge reports several incidents when it was impossible to communicate with search and rescue teams, and it had to use runners to transmit messages in and out of burning buildings.⁷ Also, vehicles responding to calls in the eastern portion of the

¹ Hauppauge Fire District Petition for Reconsideration (filed Jan. 20, 2000) (Petition).

² Hauppauge Fire District, *Memorandum Opinion and Order*, DA 99-2830 (WTB rel. Dec. 21, 1999) (*Order*).

³ See 47 U.S.C. s 337; see also Balanced Budget Act of 1997, Pub. L. No. 105-33, 111 Stat. 252 (1997), § 3004 (Balanced Budget Act).

⁴ 47 C.F.R. § 1.925.

⁵ *Order*, ¶ 2.

⁶ *Id.*

⁷ *Id.* See Memorandum from Michael P. Mooney, Chief of Department, Hauppauge Fire Department, to Board of Fire Commissioners, Hauppauge Fire District, dated June 23, 1999, filed June 24, 1999.

District have been unable to communicate with headquarters.⁸ On July 16, 1997, Hauppauge filed a waiver request and an associated application for authorization to augment its existing fire radio system and operate temporarily on 47.16 MHz.⁹ According to Hauppauge, it plans to upgrade its system and migrate to the UHF band when it has sufficient funding.¹⁰ Under its proposed implementation schedule, Hauppauge anticipates that it will require the use of frequency 47.16 MHz for approximately four years.¹¹

3. Hauppauge sought to coordinate its use of frequency 47.16 MHz, which is allocated for highway maintenance operations, with the American Association of State Highway and Transportation Officials (AASHTO).¹² AASHTO, the FCC-certified frequency coordinator for highway maintenance channels, rejected the proposed assignment, stating that it was "clearly outside the scope of the FCC rules and therefore cannot be approved."¹³ In this regard, AASHTO referred to "the Geographic Allocation Plan" for highway maintenance frequencies, which does not permit the use of 47.16 MHz within the State of New York.¹⁴

4. The Bureau's Public Safety and Private Wireless Division sought comment on Hauppauge's waiver request and modification application on August 13, 1999.¹⁵ On December 21, 1999, the Bureau released an *Order* denying Hauppauge's request. The *Order* found that Hauppauge failed to meet two of the criteria under Section 337(c). Specifically, Hauppauge failed to demonstrate that no other spectrum allocated to public safety services is immediately available to satisfy the requested public safety service use, and it did not show that its proposed use of 47.16 MHz would not create harmful interference to other spectrum users entitled to protection from such interference.¹⁶ The *Order* also found that Hauppauge failed to satisfy the waiver standard under Section 1.925 of the Commission's Rules.¹⁷ Hauppauge's Petition, filed on January 20, 2000, requests reconsideration of these findings.¹⁸

⁸ *Id.*

⁹ *Id.*, ¶ 3.

¹⁰ *Id.*, ¶ 2.

¹¹ *Id.*, ¶ 3.

¹² *Order*, ¶ 3; see 47 C.F.R. §§ 90.20(c), 90.175.

¹³ *Id.*, ¶ 3. See Letter from Larry A. Miller, Frequency Coordination Manager, AASHTO, to Russ Taylor, Gardner, Carton & Douglas, dated July 22, 1997.

¹⁴ *Order*, ¶ 3.

¹⁵ Wireless Telecommunications Bureau Seeks Comment on Requests for Waiver by Brentwood and Hauppauge Fire Districts, Suffolk County, New York, to Obtain Licenses for 47 MHz Frequencies Allocated for Highway Maintenance, *Public Notice*, 14 FCC Rcd 13342 (WTB PSPWD 1999). We received one comment, from AASHTO.

¹⁶ *Order*, ¶ 7.

¹⁷ *Id.*, ¶ 8.

¹⁸ Petition at 1. AASHTO filed an opposition to the petition on March 9, 2000. On March 21, 2000, Hauppauge filed its reply to opposition, and on or around April 5, 2000, AASHTO filed another document in which it seeks to address arguments made in Hauppauge's reply. Because AASHTO's opposition was filed after the 30-day (continued....)

III. DISCUSSION

A. Waiver under Section 337(c) of the Act.

5. Section 337 of the Act provides public safety entities with a statutory means of obtaining a waiver of the Commission's Rules.¹⁹ Subsection (c)(1) of Section 337 provides as follows:

(c) Licensing of Unused Frequencies for Public Safety Services.--

(1) Use of unused channels for public safety services.--Upon application by an entity seeking to provide public safety services, the Commission shall waive any requirement of this Act or its regulations implementing this Act (other than its regulations regarding harmful interference) to the extent necessary to permit the use of unassigned frequencies for the provision of public safety services by such entity. An application shall be granted under this subsection if the Commission finds that--

(A) no other spectrum allocated to public safety services is immediately available to satisfy the requested public safety service use;

(B) the requested use is technically feasible without causing harmful interference to other spectrum users entitled to protection from such interference under the Commission's regulations;

(C) the use of the unassigned frequency for the provision of public safety services is consistent with other allocations for the provision of such services in the geographic area for which the application is made;

(D) the unassigned frequency was allocated for its present use not less than 2 years prior to the date on which the application is granted; and

(E) granting such application is consistent with the public interest.²⁰

6. When considering requests under Section 337, we first must determine whether the applicant is "an entity seeking to provide public safety services."²¹ We found in the *Order* that the purpose of the services proposed by Hauppauge is to protect the safety of life, health, and property, and that such services are not to be made commercially available to the public, as required by Section 337(f).²²

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deadline set forth in our Rules, it is untimely and we will not consider its merits. See 47 C.F.R. § 1.106(g). Consequently, we also will not consider the subsequent pleadings.

¹⁹ See 47 U.S.C. § 337; see also Balanced Budget Act, § 3004.

²⁰ 47 U.S.C. § 337(c)(1).

²¹ 47 U.S.C. § 337(c). Section 337(f) defines the term "public safety services" as

services--

the sole or principal purpose of which is to protect the safety of life, health, or property;

that are provided--

(i) by State or local government entities; or

(ii) by nongovernmental organizations that are authorized by a governmental entity whose primary mission is the provision of such services; and

(C) that are not made commercially available to the public by the provider.

47 U.S.C. § 337(f).

²² *Order*, ¶ 6.

Thus, we continue to believe that Hauppauge has met the threshold requirement.

7. We denied Hauppauge's request for a waiver pursuant to Section 337 because it did not satisfy all five statutory criteria.²³ On reconsideration, Hauppauge first argues that all five of the factors need not be satisfied in order for us to grant a waiver under Section 337.²⁴ To the contrary, the plain language of subsection (c) provides that a waiver request should be granted only upon a finding that all five conditions are met regarding the spectrum specifically sought by the applicant,²⁵ and the Commission and Bureau have required that applicants meet all five criteria.²⁶ Consequently, unless Hauppauge satisfies each of the five factors, its application cannot be granted under Section 337(c) of the Act.

8. In the *Order*, we stated that Hauppauge has not shown that no other spectrum allocated to public safety services was immediately available to satisfy the requested public safety service use, as required by Section 337(c)(1)(A).²⁷ We determined that this showing had not been met because public safety spectrum was available in the UHF band, to which Hauppauge ultimately plans to migrate.²⁸ In response, Hauppauge argues that the statute requires only that there be no unassigned public safety spectrum in the particular band targeted for the applicant's proposed use.²⁹ We recently rejected the argument that Section 337(c)(1)(A) requires only a showing that no public safety spectrum is available in the desired band:

The language of the statute is not limited to the desired band. Nor does the legislative history, which states only that "spectrum must not be immediately available on a frequency already allocated for public safety services," suggest a narrow scope for this requirement. [This argument] is also contrary to the Commission's and Bureau's analysis of other Section 337 waiver requests. Thus, we find that our analysis of Section 337(c)(1)(A) was proper and consistent with Commission precedent.³⁰

Hauppauge also contends that the *Order* reads the word "available" too narrowly, which has the effect of

²³ *Id.*, ¶¶ 5, 7.

²⁴ Petition at 2.

²⁵ See 47 U.S.C. § 337(c)(1); see also H.R. Conf. Rep. No. 217, 105th Cong., 1st Sess., at 579 (1997) (Conference Report) ("Before granting applications under this subsection, the Commission must make five specific findings . . .").

²⁶ See Implementation of Sections 309(j) and 337 of the Communications Act of 1934 as Amended, *Notice of Proposed Rule Making*, WT Docket No. 99-87, 14 FCC Rcd 5206, 5234 ¶ 56 (1999); License Communications Services, Inc., *Memorandum Opinion and Order*, 13 FCC Rcd 23781, 23796 ¶ 33 (1998) (*South Bay*); City of Pomoná, California, *Order*, DA 00-161, ¶ 7 (WTB rel. Feb. 1, 2000) (*Pomona*); New Hampshire Department of Transportation, *Memorandum Opinion and Order*, 14 FCC Rcd 19438, 19442 ¶ 8 (WTB 1999).

²⁷ *Order*, ¶ 7.

²⁸ *Id.*

²⁹ Petition at 3-4.

³⁰ County of Burlington, New Jersey, *Order on Reconsideration*, DA 00-814, ¶ 7 (WTB rel. Apr. 12, 2000) (*Burlington*) (footnotes omitted) (citing, e.g., Conference Report at 579-80).

interpreting Section 337 “out of existence.”³¹ We disagree. In fact, we have granted Section 337 waivers in several instances only where the applicant has demonstrated that there is no other spectrum immediately available.³² Thus, we continue to believe, as stated in the *Order*, that the availability of UHF channels for public safety use, a fact conceded by Hauppauge, causes the instant waiver request to be deficient.

9. In addition, we found that Hauppauge failed to demonstrate that the proposed use of the frequency is technically feasible without causing harmful interference to other spectrum users entitled to protection from such interference under the Commission’s regulations, as required by Section 337(c)(1)(B).³³ In the *Order*, we found Hauppauge’s showing that there are no co-channel stations within seventy miles of its proposed transmitter, or anywhere in New York, Connecticut, or New Jersey to be insufficient, because “Hauppauge did not provide . . . any analysis of its service and interference contours, nor did it provide an analysis of licensees’ operations in the States of Pennsylvania and Massachusetts in order to ascertain the potential for co- and adjacent channel interference.”³⁴ In response, Hauppauge states that because 47 MHz assignments are not exclusive and there is no FCC-specified interference protection criteria, there is no valid measure by which Hauppauge could demonstrate that it would not cause harmful interference and no statutory requirement that it do so.³⁵

10. Hauppauge nonetheless submitted a new engineering analysis with its Petition demonstrating that its 19 dBu interference contour would not overlap any co-channel station’s 37 dBu service contour.³⁶ We begin with Hauppauge’s new engineering analysis. We find it does not analyze the potential effect of Hauppauge’s proposed operations on adjacent channel stations, despite the clear statement in the *Order* expressing concern for such licensees.³⁷ In addition, Hauppauge’s suggestion that Section 337(c)(1)(B) of the Act is of no effect when an applicant seeks access to a shared frequency is incorrect. Hauppauge’s assertion that there are no meaningful interference protection criteria is also incorrect. In this regard, we note that we require applicants to coordinate frequencies through frequency coordinators to ensure that the grant of an application will result in the assignment of a suitable channel, minimizing harmful interference to other operators.³⁸ For previous instances where the Commission or Bureau has granted Section 337 waiver requests, the applicant demonstrated that there would be no

³¹ Petition at 3.

³² See, e.g., *Burlington*, ¶ 9; County of San Mateo, California, *Memorandum Opinion and Order*, DA 99-2521 ¶ 11 (WTB rel. Nov. 12, 1999).

³³ *Order*, ¶ 7.

³⁴ *Id.*

³⁵ Petition at 4-5.

³⁶ *Id.* at Ex. A.

³⁷ Our licensing records indicate that there are more than 70 adjacent channel licensees as close or closer to Hauppauge’s proposed transmitter than the nearest co-channel station, including more than 20 stations within 25 miles.

³⁸ See, e.g., Amendment of Part 90 Concerning the Commission’s Finder’s Preference Rules, *Report and Order*, WT Docket No. 96-199, 13 FCC Rcd 23816, 23820 ¶ 8 (1998); Frequency Coordination in the Private Land Mobile Radio Services, *Report and Order*, PR Docket No. 83-737, 103 FCC 2d 1093, 1095 ¶ 2 (1986).

harmful interference by obtaining coordination through a FCC-certified public safety frequency coordinator.³⁹ Hauppauge's statement that "it received indication that AASHTO would again reject its request" does not relieve it of this requirement.⁴⁰ Hauppauge should have resubmitted its application to AASHTO and, if denied, consistent with the *Order*, AASHTO then would be required to provide Hauppauge with the basis for its denial.⁴¹ Thus, we conclude that our decision in the *Order* denying Hauppauge's request for a waiver pursuant to Section 337 of the Act was correct based on the record before us in this proceeding.

B. Waiver Under Section 1.925 of the Commission's Rules

11. In order for us to grant a waiver under Section 1.925 of the Rules, the applicant must demonstrate that:

- (i) The underlying purpose of the rule(s) would not be served or would be frustrated by application to the instant case, and that a grant of the requested waiver would be in the public interest; or
- (ii) In view of unique or unusual factual circumstances of the instant case, application of the rule(s) would be inequitable, unduly burdensome or contrary to the public interest, or the applicant has no reasonable alternative.⁴²

12. The *Order* concluded that Hauppauge had met neither standard. We found that the underlying purpose of the rules would be served by application to the instant case, because the Part 90 frequency coordination and geographic plan requirements are intended to prevent harmful interference to co- and adjacent channel Highway Maintenance Radio Service operations, and Hauppauge had not submitted sufficient information to establish that it would not cause such interference.⁴³ We also found that Hauppauge had a reasonable alternative in the UHF band, and perhaps in other bands, as well.⁴⁴ Hauppauge argues that our analysis is flawed because (1) there are no interference protection criteria for the 47 MHz band; (2) Hauppauge is being punished for AASHTO's failure to meaningfully consider its request; (3) contrary to the *Order's* findings, there are no other alternatives to the 47 MHz band; and (4) the Bureau failed to reexamine the engineering basis for the geographical frequency assignment plan found in Section 90.20(c)(3) of the Rules.

13. Hauppauge has provided no new information that warrants reconsideration of our finding that it failed to meet the waiver standard. As noted earlier, we continue to believe that Hauppauge has not submitted sufficient information to establish that it will not cause harmful interference to other users of the 47 MHz band. It is clear that the purpose of the rules would be served by their application to the instant case, and we need not consider Hauppauge's other arguments with respect to the first waiver standard in further detail. Regarding the availability of alternative frequencies, Hauppauge still has not

³⁹ See, e.g., *South Bay*, 13 FCC Rcd 23796 ¶ 35; *Burlington*, ¶ 11; *Pomona*, ¶ 9.

⁴⁰ Petition at 7.

⁴¹ See *Order*, ¶ 12.

⁴² 47 C.F.R. §§ 1.925(b)(3)(i), (ii).

⁴³ *Order*, ¶¶ 9-10.

⁴⁴ *Id.* ¶ 11.

demonstrated that other suitable frequencies are unavailable.⁴⁵ Hauppauge's assertion that only 47 MHz band frequencies will fit its need for mutual aid communications with other local fire departments⁴⁶ is at odds with its earlier representation that it intends to use 47.16 MHz only temporarily, until it migrates to the UHF band. Based on the record before us, we conclude that grant of a waiver pursuant to Section 1.925 of the Commission's Rules is not warranted.

IV. CONCLUSION

14. We find that Hauppauge has not demonstrated that it meets the criteria for a waiver of the Commission's Rules pursuant to Sections 337(c)(1)(A) and (B) of the Act, because it has not shown that no other spectrum allocated for public safety services is available, and it has not demonstrated that no harmful interference would result from a grant of its application. Similarly, we find that Hauppauge has not satisfied the waiver criteria under Section 1.925 of the Rules.

V. ORDERING CLAUSES

15. Accordingly, IT IS ORDERED that, pursuant to Sections 4(i) and 337(c) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 337(c), and Sections 1.106 and 1.925 of the Commission's Rules, 47 C.F.R. §§ 1.106, 1.925, Hauppauge Fire District's Petition for Reconsideration filed January 20, 2000, is DENIED.

16. This action is taken under delegated authority pursuant to Sections 0.131 and 0.331 of the Commission's Rules, 47 C.F.R. §§ 0.131, 0.331.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen O'Brien Ham
Deputy Chief, Wireless Telecommunications Bureau

⁴⁵ *Id.*

⁴⁶ Petition at 7.